Indian Claims Commission

BLOOD TRIBE / KAINAIWA INQUIRY

Report on: 1889 Akers Surrender

Indian Claims Commission

Commission des revendications des Indiens

June 30, 1999

Chief Chris Slade and Council
Blood Tribe/Kainaiwa

The Honourable Jane Stewart
Minister of Indian Affairs and Northern Development

The Honourable Anne McLellan
Minister of Justice and Attorney General of Canada

Re: Blood Tribe / Kainaiwa Inquiry
1889 Akers surrender

The Blood Tribe / Kainaiwa initiated proceedings before this Commission by letter dated August 29, 1996, from Lesia Ostertag, Counsel for the First Nation, to the Indian Claims Commission. On April 15, 1998, John Sinclair, Assistant Deputy Minister, Claims and Indian Government, informed the parties that the Government of Canada had offered to accept for negotiation the Blood Tribe / Kainaiwa's specific claim regarding the September 2, 1889, Akers surrender of 440 acres.

In view of Canada's acceptance, the Commission has taken no further steps to inquire into the First Nation's claim. Our review of the history of this claim and summary of events are contained in the attached report that we are now honoured to present to you.

FOR THE INDIAN CLAIMS COMMISSION

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INDIAN CLAIMS COMMISSION

BLOOD TRIBE / KAINAIWA INQUIRY

1889 AKERS SURRENDER

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PART I

INTRODUCTION

On April 15, 1998, Canada informed the Blood Tribe / Kainaiwa that its specific claim regarding the 1889 Akers surrender had been accepted for negotiation of a settlement.[1] Meetings were then scheduled to start negotiations.[2] At issue in this claim is a clerical error in a treaty amendment which, according to the First Nation, the federal government failed to correct and which resulted in the federal government's taking an unlawful surrender of 440 acres of mineral-rich reserve land without full consent or compensation.

The federal government initially rejected this claim. This rejection was reversed in part because of elders' oral history concerning the circumstances of the surrender, which was brought to light during the Commission's community sessions, and in part because of developments in case law, in particular, the *Apsassin*[3] decision.

This report sets out the background to the First Nation's claim and is based entirely on the documents provided by the First Nation and by the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND) to the Indian Claims Commission. In view of Canada's decision to accept the claim for negotiation of a settlement, no further steps have been taken by the Commission to inquire into the First Nation's claim, and we make no findings of fact. This report contains a brief summary of the claim and is intended only to inform the public about the nature of the issues involved and that the First Nation's claim has been accepted for negotiation under the Specific Claims Policy.

In April 1995, the Blood Tribe / Kainaiwa submitted a specific claim to the Minister of Indian Affairs and Northern Development regarding the September 2, 1889, surrender of 440 acres from the Blood reserve.[4] In August 1995, DIAND advised the First Nation that a portion of its specific claim,

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1 John Sinclair, ADM, Department of Indian Affairs and Northern Development (DIAND), to Chief Chris Shade, Blood Tribe / Kainaiwa, April 15, 1998 (ICC file 2108-25-1) (reproduced as Appendix A).

2 Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, to Ron Maurice, Commission Counsel, Indian Claims Commission (ICC), and Christopher Fleck, DIAND, September 15, 1998 (ICC file 2108-25-1).

3 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344.

4 Blood Tribe / Kainaiwa, Specific Claim Submission: The Akers Surrender, April 1995 (ICC Exhibit 4).

the Akers claim, disclosed an "outstanding lawful obligation" to the First Nation.[5] However, DIAND rejected the claim that the surrender was unlawful.[6] Subsequently, in August 1996, the Blood Tribe / Kainaiwa requested an inquiry into that rejected claim by the Commission.[7] The inquiry was held in abeyance at the request of the First Nation until the conclusion of the first part of the Akers claim was ratified by their membership in March 19, thereby activating the inquiry.[8]

A planning conference was scheduled for August 1, 1997,[9] in advance of which the parties corresponded to clarify the issues relating to the inquiry and their preliminary positions.[10] Later in August the Commission circulated a summary of the proceedings.[11] Counsel to the First Nation also circulated submissions on the procedural issue of whether the onus of proof shifts to the Crown in an inquiry where evidence is inconclusive.[12] In September1997, the Commission circulated a revised

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5 Jack Hughes, Research Manager, DIAND, to Chief Roy Fox, Blood Tribe, August 14, 1995; John Sinclair, Assistant Deputy Minister, DIAND, December 19, 1995 (ICC file 2108-25-1).

6 Jack Hughes, Research Manager, DIAND, to Chief Roy Fox, Blood Tribe, August 14, 1995 (ICC file 2108-25-1).

7 Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, to Indian Claims Commission, August 29, 1996, attaching Band Council Resolution dated August 27, 1996, and Blood Tribe Supplemental Submission Relating to the Akers Surrender, August 19, 1996 (ICC file 2108-25-1) (reproduced as Appendix B).

8 Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, to Ron Maurice, Commission Counsel, ICC, October 7, 1996; Annabel Crop Eared Wolf, Tribal Government Coordinator, to Indian Claims Commission, May 12, 1997; Ron Maurice, Commission Counsel, ICC, to Michel Roy, Director General, Specific Claims Branch, and W. Elliott, Senior General Counsel, DIAND, June 11, 1997 (ICC file 2108-25-1).

9 Kathleen Lickers, Associate Legal Counsel, ICC, to Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, and Aly Alibhai, Legal Counsel, DIAND, July 11, 1997 (ICC file 2108-25-1).

10 Aly Alibhai, Legal Counsel, DIAND, to Kathleen Lickers, Associate Legal Counsel, ICC, July 24, 1997; Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, to Kathleen Lickers, Associate Legal Counsel, ICC, July 25, 1997 (ICC file 2108-25-1).

11 Ron Maurice, Commission Counsel, ICC, to Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, and Aly Alibhai, Counsel, DIAND, August 18, 1997, attaching ICC Planning Conference, Blood Tribe / Kainaiwa First Nation [Akers Surrender (1889)], Calgary, Alberta, August 1, 1997 (ICC file 2108-25-1).

12 Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, to Ron Maurice, Commission Counsel, ICC, August 28, 1997 (ICC file 2108-25-1).

summary of the planning conference,[13] DIAND requested additional amendments,[14] and the Commission further revised the summary.[15]

A community session for the inquiry was held on October 22-23, 1997,[16] in advance of which the First Nation asked the Commission about how to gather oral history evidence from members of the Blood Tribe, as well as on how to use historical reports.[17] At the community session, elders of the First Nation provided interesting and pertinent information, in particular relating to the effect that no valid surrender had ever taken place. Subsequently, a copy of the exhibits for the claim was circulated among the parties,[18] along with other relevant documents.[19]

In December 1997, DIAND advised the parties of its request that the Department of Justice undertake a further review of the 1889 Akers surrender, based, in part, on "new developments in the law since the time the DOJ first rendered its opinion with respect of the validity of the Akers 1889 surrender."[20] DIAND further advised that such a review would take into account the First Nation's

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13 Ron Maurice, Commission Counsel, ICC, to Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, and Aly Alibhai, Counsel, DIAND, September 5, 1997, attaching Revised Summary, Indian Claims Commission Planning Conference, Blood Tribe / Kainaiwa First Nation [Akers Surrender (1889)], Calgary, Alberta, August 1, 1997 (ICC file 2108-25-1).

14 Aly Alibhai, Counsel, DIAND, to Ron Maurice, Commission Counsel, ICC, September 8, 1997 (ICC file 2108-25-1).

15 Ron Maurice, Commission Counsel, ICC, to Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, and Aly Alibhai, Counsel, DIAND, September 16, 1997, attaching Summary (Revised as of September 16, 1997), Indian Claims Commission Planning Conference, Blood Tribe / Kainaiwa First Nation [Akers Surrender (1889)], Calgary, Alberta, August 1, 1997 (ICC file 2108-25-1).

16 ICC Transcript, October 22 and 23, 1997 (Senator Gladstone Hall).

17 Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, to Ron Maurice, Commission Counsel, ICC, September 26, 1997 (ICC file 2108-25-1).

18 Ralph Keesickquayash, Associate Legal Counsel, ICC, to Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, and Aly Alibhai, Counsel, DIAND, November 5, 1997 (ICC file 2108-25-1).

19 Isabelle Tessier, Access to Information and Privacy (ATIP) Review Analyst, DIAND, to Fred Isaac, ICC, December 1, 1997; Betty Recollet, ICC, to Carol Etkin, DIAND, January 15, 1998, attaching transcripts for the Blood Tribe / Kainaiwa Inquiry (ICC file 2108-25-1).

20 Anne-Marie Robinson, Director, Policy and Research Directorate, DIAND, Specific Claims Branch, to Commissioners P.E. James Prentice, Carole Corcoran, and Dan Bellegarde, ICC, December 19, 1997 (ICC file 2108-25-1).

written submissions to date, along with evidence gathered from the community session and in the course of the inquiry. Accordingly, the inquiry was held in abeyance until the Department of Justice had rendered its opinion, which was expected to take "a few months."[21]

Although all parties agreed to this delay, the First Nation expressed its concern that the claim be resolved as quickly as possible and requested that the inquiry proceed immediately after February 20, 1998, in the event no resolution was pending.[22] On February 25, 1998, the federal government advised the First Nation that the review of the Akers surrender of 1889 had been completed, and that a formal response was forthcoming.[23]

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1, 1992. The Order in Council directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> b) which compensation criteria in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[24]

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21 Anne-Marie Robinson, Director, Specific Claims Branch, DIAND, to Commissioners P.E. James Prentice, Carole Corcoran, and Dan Bellegarde, ICC, December 19, 1997 (ICC file 2108-25-1).

22 Dorothy First Rider, Kainaiwa, to Anne-Marie Robinson, Director, Specific Claims Branch, DIAND, and Commissioner P.E. James Prentice, ICC, January 6, 1998 (ICC file 2108-25-1).

23 Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, to Anne-Marie Robinson, Director, Specific Claims Branch, DIAND, March 20, 1998; Anne-Marie Robinson, Director, Specific Claims Branch, DIAND, to Lesia Ostertag, Counsel to Blood Tribe / Kainaiwa, April 3, 1998 (ICC file 2108-25-1).

24 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991; reprinted in (1994) 1 ICCP xv.

Thus, if the Commission had completed the inquiry into the Blood Tribe / Kainaiwa's claim, the Commissioners would have evaluated that claim based upon Canada's Specific Claims Policy. DIAND has explained the Policy in a booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[25] In particular, the booklet states that when considering specific claims:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> i) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> ii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iii) An illegal disposition of Indian land.

The Policy also addresses the following types of claims which fall under the heading "Beyond Lawful Obligation":

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[26]

The Commission has the authority to review thoroughly the historical and legal bases for the claim and the reasons for its rejection with the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, to gather information, and even to subpoena evidence if necessary. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant First Nation, it

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25 DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereafter *Outstanding Business*).

26 *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 171-85.

may recommend to the Minister of Indian Affairs and Northern Development that the claim be accepted for negotiation.

THE CLAIMS PROCESS

As outlined in *Outstanding Business*, a First Nation may submit its specific claim to the Minister of Indian Affairs, who acts on behalf of the Government of Canada. The claimant First Nation begins the process by submitting a clear and concise statement of claim, along with a comprehensive historical and factual background on which the claim is based. The claim is referred to DIAND's Specific Claims Branch, which usually conducts its own confirming research into a claim, makes claim-related research findings in its possession available to the claimants, and consults with them at each stage of the review process.

Once all the necessary information has been gathered, the facts and documents will be referred to the Department of Justice for advice on the federal government's lawful obligation. Generally, if the Department of Justice finds that the claim discloses an outstanding lawful obligation, the First Nation is so advised, and the Specific Claims Branch will offer to enter into compensation negotiations.

The Commission's Planning Conferences

In view of the Commissioners' broad authority to "adopt such methods . . . as they may consider expedient for the conduct of the inquiry," they have placed great emphasis on the need for flexibility and informality and have encouraged the parties to be involved as much as is practicable in the planning and conduct of the inquiry. It is to this end that the Commission developed the planning conference as a forum in which representatives of the First Nation and Canada meet to discuss and resolve issues in a cooperative manner.

Planning conferences have been chaired by the Commission to plan jointly the inquiry process. Briefing material is prepared by the Commission and sent to the parties in advance of the planning conference so as to facilitate an informed discussion of the issues. The main objectives of the planning conference are to identify and explore the relevant historical and legal issues; to identify which historical documents the parties intend to rely on; to determine whether the parties intend to call

elders, community members, or experts as witnesses; and to set time frames for the remaining stages of the inquiry, in the event that the parties are unable to resolve the matters in dispute. The first planning conference also allows the parties an opportunity to discuss whether there are any preliminary issues regarding the scope of the issues, or the mandate of the Commission.

Depending on the nature and complexity of the issues, there may be more than one planning conference. The parties are given an opportunity, often for the first time, to discuss the claim face to face. The parties themselves are able to review their position in the light of new or previously unrevealed facts and the constantly evolving law. Even if the planning conferences do not lead to a resolution of the claim and a formal inquiry process is necessary, the conferences assist in clarifying issues and help make the inquiry more effective.

PART II

HISTORICAL BACKGROUND

BACKGROUND TO THE FIRST NATION'S CLAIM

On September 22, 1877, the Blood Tribe / Kainaiwa signed Treaty Number 7.[27] Under the terms of the treaty, a reserve was set aside for the Blackfeet, Blood, and Sarcee Bands. The reserve is described therein as

> a belt of land on the north side of the Bow and South Saskatchewan Rivers, of an average width of four miles along said rivers, down stream, commencing at a point on the Bow River twenty miles north-westerly of the Blackfoot Crossing thereof, and extending to the Red Deer River at its junction with the South Saskatchewan; also, for the term of ten years, and no longer, from the date of the concluding of this Treaty, when it shall cease to be a portion of said Indian reserves, as fully, to all intents and purposes as if it had not at any time been included therein, and without any compensation to individual Indians for improvements, of a similar belt of land on the south side of the Bow and Saskatchewan Rivers of an average width of one mile along said rivers, down stream; commencing at the aforesaid point on the Bow River, and extending to a point one mile west of the coal seam on said river, about five miles below the said Blackfoot Crossing; beginning again one mile east of the said coal seam and extending to the mouth of Maple Creek at its junction with the South Saskatchewan; and beginning again at the junction of the Bow River with the latter river, and extending on both sides of the South Saskatchewan in an average width on each side thereof of one mile, along said river against the stream, to the junction of the Little Bow River with the latter river. . . .

The Blood Tribe was dissatisfied with the reserve located at Blackfoot Crossing.[28] On December 31, 1880, Indian Commissioner Edgar Dewdney reported to the Superintendent General of Indian Affairs that, after meeting with Chief Mekasto (also known as Chief Red Crow) at Fort Macleod, the tribe

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27 *Treaty and Supplementary Treaty No. 7, made 22nd Sept., and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort Macleod* (1877; repr. DIAND Publication No. QS- 0575- 000-EE-A, Ottawa: Queen's Printer, 1966).

28 Blackfoot and Blood Chiefs, to Lt. Gov. Alexander Morris, Province of Manitoba and N.W.T., January 1, 1876, "Blackfoot and Blood Chiefs Petition," Provincial Archives of Manitoba, Alexander Morris Papers, document 1265 (ICC Documents, pp. 1-2).

agreed to surrender its interest in the Blackfoot Crossing Reserve in exchange for a new reserve.[29] The Commissioner reported:

> The Bloods, a portion of the Blackfeet Nation . . . notified me last year that they were not content with their reserve as agreed upon to be given them at the time of the treaty. I reported this matter to the Government last winter, and an Order in Council was passed authorizing Colonel Mcleod and myself to meet the chiefs and endeavour to make a satisfactory arrangement by which the wishes of the Blood could be carried out.
>
> On arriving at Fort Macleod, I found a large portion of the Blood Indians awaiting my arrival, for the purpose of hearing what determination the Government had come to in regard to that matter . . . I informed the Blood Chief (Red Crow) that if he would give me a release of all his interest in the reserve situated at the Blackfoot Crossing, provided the Government would give him a reserve at the point he indicated, I would send an instructor with him and his band to the spot selected by himself where he could build houses and prepare some ground for next season and that I would recommend on my arrival below that a reserve be given to him at that point.[30]

After this meeting, the Indian Agent for Treaty 7 reported that Chief Red Crow had selected land on the south side of the Belly River from the fork of the Kootenai River eastward, and that the Blood Tribe had built 40 houses and begun cultivating land.[31]

On October 5, 1882, Assistant Indian Commissioner E.T. Galt reported on his inspection of the Blood Reserve to Commissioner Dewdney that two non-Indians had located themselves on the reserve, one of whom was David Akers:

> A man named Cochrane is in possession of a Ranch on the Blood Reserve, where he has occupied for several years, and the Indians are anxious that he should quit the

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[29] Edgar Dewdney, Indian Commissioner, to the Superintendent General of Indian Affairs, December 31, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880," 80-81.

[30] Edgar Dewdney, Indian Commissioner, to the Superintendent General of Indian Affairs, December 31, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880," 80-81.

[31] Norman T. Mcleod, Indian Agent, Treaty No. 7, to Edgar Dewdney, Indian Commissioner, December 29, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880," 97-98.

> premises. Cochrane estimates his improvements at $2,500 . . . Farms Instructor McCord, . . . puts them down at $850.
>
> A man named Akers is also a squatter on this Reserve. His improvements are at the Eastern extremity of the Reserve, and are very considerable being known as Fort Whoop-up. I have desired the Indian Agent to estimate their value, with a view to making a settlement with Akers, as the Indians will not tolerate white men living on their Reserve. I may inform you that Fort Whoop-up was built ten years ago. . . .[32]

The newly selected reserve, referred to as "Blood IR Number 148," was first surveyed by John C. Nelson during the summer of 1882. On December 29, 1882, Nelson reported to the Superintendent General of Indian Affairs that the survey had been completed, and that the area set aside was 650 square miles. He started his survey near Fort Whoop-Up[33] and traversed the St Mary's River down to the international border. The reserve was described as follows:

> a tract of country lying between, and bounded by, the St. Mary's and Belly rivers, from their junction below Whoop-up to an east and west line which forms its south boundary . . . This east and west line lies about nine miles north of the International Boundary.[34]

On January 15, 1883, Nelson wrote to the Deputy Superintendent General of Indian Affairs, recommending that, if the reserve was extended to the junction of the St Mary's and Belly Rivers, it should not include the Fort Whoop-Up area claimed by Akers. Nelson felt the area was of little value compared to the compensation the department would have to pay Akers if he were forced to move from Fort Whoop-Up.[35]

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32 E.T. [Galt] to Edgar Dewdney, Indian Commissioner, October 5, 1882, National Archives of Canada (hereafter NA), RG 10, vol. 3637, file 7134, mfm reel C-10112 (ICC Documents, pp. 3-15).

33 Fort Hamilton, built by Montana whiskey traders in 1869, was the first fort established in the area of present-day Fort Whoop-Up. In 1870 the fort was renamed Fort Whoop-Up. David Akers purchased the property in 1876.

34 John C. Nelson, Dominion Land Surveyor (DLS), to Superintendent General of Indian Affairs, December 29, 1882, Canada, Parliament, *Sessional Papers*, 1883, No. 5, "Report of the Department of Indian Affairs for the Year Ended 31st December, 1882."

35 John C. Nelson, DLS, to Deputy Superintendent General of Indian Affairs, January 15, 1883 (ICC Documents, pp. 16-17).

On July 2, 1883, Chief Mekasto and the minor Chiefs of the Blood Tribe finalized the agreement to exchange reserve land as negotiated with Indian Commissioner Dewdney in 1880 and amended Treaty 7 of 1877.[36] The First Nation also requested a reserve in exchange for one granted in 1877. The new reserve contained 547.5 square miles for a band population of 546 people. The amended treaty also excluded the area where Fort Whoop-Up was located. However, owing to an error in the text of the treaty, the wrong quarter section was inserted in the amendment. The amendment describes the reserve as follows:

> Commencing on the north bank of the St. Mary's River at a point in north latitude forty-nine degrees twelve minutes and sixteen seconds (49°12′16″); thence extending down the said bank of the said river to its junction with the Belly River; thence extending up the south bank of the latter river to a point thereon in north latitude forty-nine degrees, twelve minutes and sixteen seconds (49°12′16″), and thence easterly along a straight line to the place of beginning; excepting and reserving from out the same any portion of the *north-east* quarter of section number *three*, in township number eight, in range twenty-two, west of the Fourth Principal Meridian, that may lie within the above mentioned boundaries.[37]

During the summer of 1883, Nelson concluded his survey of the new reserve.[38] In his field notes, Nelson reported that the survey was undertaken "in accordance with the Amended Treaty of July 2nd, 1883." Nelson reported that he excluded from the reserve "any portion of the north-west quarter of section three, township eight, range twenty-two, west of the fourth initial Meridian."[39] Based on a plan approved and confirmed by the Surveyor General dated March 28, 1884, the total acreage of sections 2, 3, and 11 contained 549 acres and the acreage within section 3 was 460 acres. The

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36 *Treaty and Supplementary Treaty No. 7, made 22nd Sept., and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort Macleod*, (1877; repr. DIAND Publication No. QS- 0575- 000-EE-A, Ottawa: Queen's Printer, 1966).

37 No. 203, Canada, *Indian Treaties and Surrenders, from 1680 to 1890 in Two Volumes* (1891; facsimile reprint, Saskatoon: Fifth House Publishers, 1993), 2: 134-35. Emphasis added.

38 John C. Nelson, DLS, to Edgar Dewdney, Indian Commissioner, April 30, 1886 (ICC Documents, pp. 127-28).

39 John C. Nelson, DLS, to Edgar Dewdney, Indian Commissioner, April 30, 1886 (ICC Documents, pp. 127-28).

northwest quarter section where Fort Whoop-Up was located contained 118 acres and the area excluded by Nelson from the northeast quarter section contained 140 acres.[40]

On September 9, 1885, the Superintendent for the Department of the Interior, William Pearce, informed Commissioner Dewdney that Akers had applied for a grant of 600 acres located on the Blood Reserve as well as 379 acres outside the limits of the Blood Reserve.[41] Superintendent Pearce indicated that "the Indian Department would have to be considered before any definite action can be taken with that portion of Aker's claim lying between the Rivers."[42] On September 17, 1885, the Commissioner of Dominion Lands, H.H. Smith, reported to the Minister of Interior that he had instructed his agent to sell 195 acres located outside the Blood Reserve to Akers. Commissioner Smith also informed the Minister that the Indian Department would have to first relinquish its claim to the reserve lands before any grant of those lands could be made to Akers.[43] The Department of the Interior relayed its request to the Deputy Superintendent General of Indian Affairs, L. Vankoughnet.[44]

On November 25, 1885, Vankoughnet informed Commissioner Dewdney of the request and stated that "no permission to purchase or homestead can under any circumstances be given until Indians formally surrender the Land."[45] On December 7, 1885, Commissioner Dewdney, responded to the Superintendent General of Indian Affairs as follows:

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[40] Plan of Township No. 8, Range 22, West of fourth Meridian, approved and confirmed for the Surveyor General and signed by E. Deville, March 28, 1884.

[41] William Pearce, Superintendent, Department of the Interior, to Edgar Dewdney, Indian Commissioner, September 9, 1885 (ICC Documents, pp. 84-90). The area requested was bounded by the Belly and St Mary's Rivers and by the southerly and westerly limits of section 3, township 8, range 22, west 4th meridian.

[42] William Pearce, Superintendent, Department of the Interior to Edgar Dewdney, Indian Commissioner, September 9, 1885 (ICC Documents, pp. 84-90).

[43] H.H. Smith, Commissioner, Dominion Lands Commission, to Minister, Department of the Interior, September 17, 1885 (ICC Documents, pp. 91-92).

[44] P.B. Douglas, Assistant Secretary, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, November 18, 1885 (ICC Documents, p. 95).

[45] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to Edgar Dewdney, Indian Commissioner, November 25, 1885 (ICC Documents, pp. 96-97).

> I have the honor to state that that portion of land claimed by Mr. Akers as shown on the township plan sent me of Township No. 8 Range 22 West of the 4th Meridian is not included in the Blood Indian Reserve and consequently the Department of the Interior may act with freedom in the matter . . . I would beg to refer you to Mr. D.L.S. Nelson's report dated Jany. 15th 1883 addressed to the Supt. Genl. wherein the reasons are given for not including the land in question in the Blood Reserve.[46]

A letter to the Deputy Minister of the Interior followed on December 17, 1885, stating that the land claimed by Akers was not within the boundaries of the Blood Reserve.[47]

On February 13, 1886, the Department of the Interior informed Akers that, upon payment of $399, a patent would be issued under his name. The proposed patent included land:

> bounded on the South by the southerly limit of Sec. 3, in Tp. 8, Range 22, West of the 4th Meridian, produced west to a point 80 chains west of the south-east angle of the said Sec. 3, thence due North to the Belly River; bounded on the North by the Belly River and on the East by the St. Mary's River, which if the survey of Tp. 8 R 22 were extended into the territory lying between the Belly & St. Mary's river would include that portion of the S.W. 1/4 (fractional) of Sec. 11, and of the fractional N.W. 1/4 of Sec. 2; and the whole of fractional Sec. 3, in said Township, containing 549 acres, more or less.[48]

On February 23, 1886, W.A. Austin of the Department of Indian Affairs alerted Deputy Superintendent General Vankoughnet that Mr Nelson's report of January 15, 1883, did not show any land being excluded between the St Mary's and Belly Rivers. He indicated that there was a contradiction between Commissioner Dewdney's letter of December 7, 1885, and Nelson's report. In referring to Nelson's report, Austin stated that he

> examined the Sketch 'e' and the portion colored as an Indian Reserve extend to the junction of those two rivers and does not exempt in anyway any portion of land lying

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46 Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, December 7, 1885 (ICC Documents, p. 99).

47 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to Deputy Minister of the Interior, December 17, 1885 (ICC Documents, p. 100).

48 P.B. Douglas, Assistant Secretary, Department of the Interior, to J.P. Burpe, Secretary, Dominion Land Commissioner, February 13, 1886 (ICC Documents, pp. 107-08).

> between these rivers and the Southern Boundary which boundary is about 9 miles north of the International Boundary. . . .
>
> There is another tracing of this reserve in the office which shows the point in question not to be in the reserve as it is not coloured in – but the report does not refer to that tracing, and upon the face of this Trace Plan it is only mentioned as a key Plan in reference to the southern boundary of the reserve.[49]

On February 26, 1886, Vankoughnet asked the Department of the Interior to delay issuing a patent to Akers,[50] and the department agreed to comply with the request on March 15, 1886.[51]

On April 3, 1886, Commissioner Dewdney wrote to the Superintendent General of Indian Affairs that he had reviewed the correspondence relating to the amended treaty and noted an error concerning the description of land to be excluded from the reserve:

> I find that part of the quarter section upon which Whoop-Up is shewn on the plans as being built viz the N.W. 1/4 Sec. 3, Tp. 8 Range 22 west of the 4th meridian is not excluded by the wording of the amended treaty from the land comprised within the reserve and instead there of the NE 1/4 Sec. is mentioned.
>
> If it appears in this manner in the original treaty on file with the Department it certainly is an error as the intention was to exclude that quarter section viz the NW 1/4 on which Whoop-up now stands and either the incorrect description of the land was furnished the Commissioners or the same was a clerical error and as Mr. Akers is I think entitled to it, I consider it would be advisable to arrange matters in such a manner as to enable him to acquire a proper title.
>
> For reasons which I cannot at present recall to mind it was considered at the time of granting the Indians their Reserve that no other portion of the tongue of land lying between the Reserves(sic) should be excluded for the benefit of Mr. Akers.[52]

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49 W.A. Austin, Department of Indian Affairs, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, February 23, 1886 (ICC Documents, pp. 110-12).

50 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to Deputy Minister of the Interior, February 26, 1886 (ICC Documents, pp. 116-17).

51 P.B. Douglas, Assistant Secretary, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, March 15, 1886 (ICC Documents, p. 119).

52 Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian, April 3, 1886 (ICC Documents, pp. 120-22).

In response to a request that he explain the circumstances surrounding the land claimed by Akers, Nelson reported on April 30, 1886, that he

> recommended that the fractional Section No. 3 at the junction of the St. Mary's & Belly River be not included in the Blood Reserve. It was however not considered necessary to exempt anything more than the quarter section on which 'Whoop-Up' is situated on account of Mr. David Akers claim. It appears that a clerical error has occurred in the wording of the treaty in which this land is described as the north-east instead of the north-west quarter of section three; but since in any case it will be necessary to secure the surrender of five additional fraction quarter sections in order to carry out the recommendations contained in Mr. Pearse's [sic] report, the error is probably of little consequence, at any rate the Blood Indians are well aware that Whoop-Up is not on their reserve.[53]

On May 10, 1886, Assistant Indian Commissioner Hayter Reed informed James F. Macleod of the clerical error in the treaty amendment of July 3, 1883, and instructed him to take the necessary step to correct the error.[54] On September 9, 1886, Macleod met with the majority of the male members of the Blood Tribe and concluded a treaty to amend the one signed on July 2, 1883. The amended Treaty read in part:

> Now these Articles witness, that the parties hereto have agreed, and they do hereby agree, that the said north-west quarter of section three in the township and range aforesaid be the land excepted from the tract of land hereinbefore described, instead of the north-east quarter of the said section; and that the tract of land hereinbefore described, with the exception last mentioned, shall be and form the reservation granted to the said Blood Indians by Her Majesty the Queen, as fully and effectually as if the said north-east quarter of section three had not been particularly mentioned in the said treaty.[55]

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53 John C. Nelson, DLS, to Edgar Dewdney, Indian Commissioner, April 30, 1886 (ICC Documents, pp. 127-28).

54 Hayter Reed, Assistant Indian Commissioner, to James F. Macleod, May 10, 1886 (ICC Documents, pp. 129-31).

55 No. 237, Canada, *Indian Treaties and Surrenders*, 2: 194.

Chief Mekasto signed an affidavit stating that the proceedings were to correct a mistake in the description of the Blood Reserve in the treaty dated July 2, 1883.[56] An order in council dated December 9, 1886, was issued approving the amendment.[57]

Shortly after signing the 1886 amendment, it became apparent to the Department of the Interior and to the Indian Department that the amendment did not include any additional lands other than the northwest quarter of section 3 that Akers had requested be patented. On January 14, 1887, Deputy Minister of the Interior A.M. Burgess wrote to Vankoughnet, indicating that the following instructions had been sent to the Commissioner of Dominion Lands:

> as the land in question was found not to be included in any Indian Reserve, Akers' claim could be settled and instructions were accordingly sent to the Local Agent and entry granted Akers for this land. It now appears that a portion of Akers' claim has been included in the Blood Indian Reserve. Mr. Akers, you will understand, has been informed by this Department that he can purchase the piece of land . . .[58]

On January 24, 1887, Vankoughnet asked Chief Surveyor Samuel Bray to report whether the land claimed by Akers was within the boundaries of the Blood reserve.[59] On January 26, 1887, Bray reported

> that the whole of the lands colored red on the Plan of township No. 8 Range 22 West of 4th M . . . that lie between the Belly and St. Mary's Rivers are within and form part of the Blood Reserve, except for the small portion indicated by parallel brown lines on the above mentioned map, the said small portion being all that portion of the North West 1/4 of Section 3 (Tp. 8 R. 22 4th M) lying within the boundaries of the Blood Indian Reserve . . . The meets [sic] and bounds of this reserve are set forth plainly and distinctly in the Treaty with the Blood Indians dated 2nd July 1883 (No. 203) the only difference being that the above mentioned land excepted from those meets [sic] and bounds is described as the North East 1/4 of Sec. 3 instead of the North West 1/4; this

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56 No. 237, Canada, *Indian Treaties and Surrenders*, 2: 195.

57 Order in Council, December 9, 1886 (ICC Documents, pp. 160-61).

58 A.M. Burgess Deputy Minister of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, January 14, 1887 (ICC Documents, pp. 165-69).

59 L. Vankoughnet, Deputy Minister, Department of Indian Affairs, to Samuel Bray, Chief Surveyor, January 24, 1887 (ICC Documents, p. 172).

> error has been corrected (vide, copy of O in C 9th Dec 1886) making the piece of land that portion of the North West 1/4 of Sec 3 & c the portion not included within the meets [sic] and bounds of the Reserve.[60]

On January 31, 1887, the Deputy Minister of the Interior was informed of Surveyor Bray's findings.[61]

On February 14, 1887, Deputy Minister Burgess informed the Deputy Superintendent General of Indian Affairs that

> as this Department has given Mr. Akers entry for this land upon information received from the Department of Indian Affairs, and as we are now informed that except so far as one fractional quarter section is concerned, the action taken cannot be recognized by the Indian Department, it will be for the Indian Department to come to an arrangement, amicable or otherwise, with Mr. Akers. I may say that Mr. Akers' case is rendered doubly hard as it now stands, by the fact that, taking for granted that nothing would occur to impair the decision arrived at by the Minister of the Interior in this case, he purchased a Military Bounty Warrant covering 320 acres of land, with the intention of applying it to the tract to be granted to him at this point, and he did so apply it by the special personal authority of the Minister of the Interior, when on the spot last July.[62]

On February 24, 1887, Vankoughnet wrote to Burgess, informing him that the Indian Commissioner has been requested to report on whether "under the circumstances of the case the Indians could not be persuaded to surrender the balance of the land patented to Mr. Akers."[63] There is no documentary evidence to show that any action was taken after instructions were sent to the Indian Commissioner in 1887.

On November 12, 1888, J.C. Nelson, who was in charge of Indian Reserve Surveys, reported to the Superintendent General of Indian Affairs that he had met with Chief Mekasto and the minor

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60 Samuel Bray, Chief Surveyor, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, January 26, 1887 (ICC Documents, pp. 173-76).

61 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to A.M. Burgess, Deputy Minister of the Interior, January 31, 1887 (ICC Documents, pp. 177-79).

62 A.M. Burgess, Deputy Minister, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, February 14, 1887 (ICC Documents, pp. 181-83).

63 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to A.M. Burgess, Deputy Minister, Department of the Interior, February 24, 1887 (ICC Documents, p. 187).

Chiefs of the Blood Tribe to discuss the boundaries of the reserve. During his visit, he retraced the boundaries, accompanied by Chief Mekasto, Blackfoot Old Women, White Calf, and the Indian Agent for the area, William Pocklington. On completion of this task, Mekasto stated that "the boundaries of his reserve as now fixed would never again be questioned."[64] Nelson also marked the northwest quarter of section 3, township 8, range 22, for Akers by planting iron posts at the corners.[65]

On January 10, 1889, Nelson wrote to the acting Deputy Minister of the Interior stating that:

> Akers might accept some of the vacant lands on the other side, viz the north east side, of the Belly & St. Mary's Rivers in lieu of certain lands in the Blood Reserve. . . . I had a conversation with [Mr. Akers] on this subject & gathered from what he said that he would willingly accept other lands in place of those lying within the reserve.[66]

On January 16, 1889, the Deputy Superintendent wrote to Akers inquiring if he had decided where he wanted to relocate.[67] Akers refused to move.[68] On March 8, 1889, the Assistant Secretary to the Department of the Interior wrote to Mr E.G. Kirby, the Dominion Lands Agent, informing him that the Department of Indian Affairs had advised that the quarter section of Fort Whoop-Up was not required for Blood Reserve and, therefore, "a patent for the half section can be issued to Akers."[69] Further unsuccessful attempts were made to ascertain if Akers would be willing to exchange his reserve holding for other lands outside the reserve.[70]

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[64] John C. Nelson, DLS, to the Superintendent General of Indian Affairs, November 12, 1888 (ICC Documents, pp. 211-17).

[65] John C. Nelson, DLS, to the Superintendent General of Indian Affairs, November 12, 1888 (ICC Documents, pp. 211-17).

[66] John C. Nelson, DLS, to John R. Hall, Deputy Minister, Department of the Interior, January 10, 1889 (ICC Documents, pp. 226-27).

[67] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to David Akers, January 16, 1889 (ICC Documents, pp. 228-29).

[68] Conybeare and Galliher, Barristers & Solicitors for David Akers, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, April 9, 1889 (ICC Documents, p. 248).

[69] P.B. Douglas, Assistant Secretary, Department of the Interior, to E.G. Kirby, Dominion Lands Agent, March 8, 1889 (ICC Documents, p.240).

[70] Hayter Reed, Indian Commissioner, to Conybeare & Galliher, Solicitor for David Akers, May 10, 1889 (ICC Documents, pp. 253-54); Hayter Reed, Indian Commissioner, to Superintendent General of Indian Affairs, June 7, 1889 (ICC Documents, pp. 260-61).

THE SURRENDER

On June 25, 1889, Deputy Superintendent General Vankoughnet instructed Indian Commissioner Hayter Reed to obtain a surrender from the Blood Tribe:

> in view of all the circumstances the only course now to pursue would appear to be to ask the Indians to surrender the land in question with a view to Mr. Akers' title thereto being perfected . . . you are hereby authorized to do and I enclose a printed form of surrender and affidavit to be used in connection therewith. The proceeds in taking the surrender should be conducted strictly in conformity with the provisions of the Indian Act.[71]

On July 4, 1889, Commissioner Hayter Reed requested additional instructions regarding compensation and the amount of land to be surrendered.[72] On July 13, 1889, the acting Deputy Superintendent General, R. Sinclair, responded as follows:

> when taking the surrender you had better make the most favourable terms possible with the Indians, committing the Department as little as possible to any question of compensation, either in land or in any other way . . . The Superintendent General doubts whether an equivalent in land could be given to the Indians in the immediate locality of the Reserve, and he considers that land at any distance from their Reserve would be comparatively valueless to them.[73]

The surrender was executed on September 2, 1889. The land surrendered was between the Belly and St Mary's Rivers to the limit of section 3, township 8, range 22, west fourth meridian with an area of 440 acres. The surrender instrument described the area as thus:

> that certain parcel or tract of land and premises, situate, lying and being in the said Blood Reserve in the District of Alberta, North West Territories containing by admeasurement about four hundred and forty acres be the same more or less and

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71 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to Hayter Reed, Indian Commissioner, June 25, 1889 (ICC Documents, pp. 265-66).

72 Hayter Reed, Indian Commissioner, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, July 4, 1889 (ICC Documents, pp. 267-68).

73 R. Sinclair, Acting Deputy Superintendent General of Indian Affairs, to Hayter Reed, Indian Commissioner, July 13, 1889 (ICC Documents, p. 269).

> being composed of that portion of the Blood Reserve lying and being at the junction of the Belly and St. Mary's rivers, being bounded on two sides by the said Rivers, on the South side by the Southerly limit of section number three in Township number eight Range twenty two west of the fourth initial Meridian and on the west by the westerly limit of said section number three, saving and excepting the north west quarter of said section number three which has already been surrendered by us the said Indians on the ninth day of September one thousand eight hundred and eighty-six.[74]

On June 11, 1890, an order in council was issued accepting the surrender:

> The Minister states that the land covered by the surrender now submitted has been occupied for a number of years by Mr. David Akers, and it was included within the boundaries of the Blood Indian Reserve when the survey of the latter was made notwithstanding the proprietary rights to the land in question acquired by Mr. Akers before the date of the Treaty made with the Indians for the extinguishment of their claims in that portion of the North West Territories, and the object of the surrender now made is to enable Mr. Akers to complete his title to said land by negotiating for the same with the Department of the Interior.[75]

There is no documentary evidence indicating that compensation was mentioned or received for the lands surrendered.

The affidavit for the surrender was signed by Chief Mekasto on December 20, 1889. The explanation for the delay is provided in a letter dated January 8, 1890, sent by Indian Agent Pocklington to the Indian Commissioner:

> I have at length succeeded in inducing 'Red Crow' to make the affidavit before His Honour Judge Macleod releasing that portion of the Reserve claimed by W.D. Akers at Whoop-up on the 19th . I took 'Red Crow' to Macleod and en route spoke to him on the question at last he told me that Mr. Akers had told 'Day Chief' that he wanted the Indians to run him off the Reserve, no doubt with a view to making a claim against the Government for the same. I told 'Red Crow' he could not very well refuse to make the affidavit as he had already done so twice but unfortunately owing to an error

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74 No. 282, Canada, *Indian Treaties and Surrenders, Volume III: Treaties 281-483* (Ottawa: C.H. Parelee Printer, 1912), 3: 3-5.

75 Order in Council PC 1448, June 11, 1890 (ICC Documents, pp. 311-12).

> in the survey, we wished him to make another. He at last said that if Mr. Justice Macleod and I said it was right he would make the affidavit.[76]

The two affidavits from Mekasto referred to by Pocklington involved the amendments to the 1877 treaty and the correction to the 1883 treaty. Neither of these affidavits involved a surrender of land. The parties have not provided any documentation regarding the minutes of the surrender, the voters list, or the results of the surrender vote.

POST-SURRENDER EVENTS

On August 5, 1892, a patent was issued to Akers for the lands discussed.[77] In 1893, the land held by Akers fell into the hands of his creditors, and Akers died in early 1894.[78] On April 3, 1894, Deputy Superintendent General Hayter Reed proposed to Assistant Indian Commissioner Forget that a portion of the Akers property be purchased and returned to reserve status.[79] However, before this proposal could be initiated, Indian Agent James Wilson was informed by the Dominion Lands Agent that the Department of Indian Affairs had no further control over these lands, and that a homestead grant had been granted to Mr William Arnold for the quarter section in dispute .[80]

On June 19, 1894, Commissioner Hayter Reed was informed that Mekasto had questioned why the Department of Interior had granted Akers's land to others, given that Akers was the only person given land on the reserve with the the Blood Tribe's consent.[81] Assistant Indian Commissioner Forget informed Hayter Reed as follows:

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[76] William Pocklington, Indian Agent, Blood Agency, to Hayter Reed, Indian Commissioner, January 8, 1890 (ICC Documents, pp. 303-06).

[77] The patent was for partial W ½ & SE 1/4 of Section 3 in Township 8, Range 22, containing 330 acres. John R. Hall, Secretary, Department of the Interior, to David Akers, October 5, 1892 (ICC Documents, pp. 354-56).

[78] James Wilson, Indian Agent, to A.E. Forget, Indian Commissioner, March 16, 1894 (ICC Documents, pp. 360-61).

[79] Hayter Reed, Deputy Superintendent General of Indian Affairs, to A.E. Forget, Indian Commissioner, April 3, 1894 (ICC Documents, pp. 362-63).

[80] W.H. Cottingham, Land Agent, Dominion Land Commission, to James Wilson, Indian Agent, June 15, 1894 (ICC Documents, p. 365).

[81] Unknown to Indian Commissioner, June 19, 1894 (ICC Documents, p. 366).

> Upon enquiry into the matter I find that the Arnold entry is upon lands covered by the surrender of 440 acres in September 1889, which though the same is not stated in the document, were surrendered for the benefit of the late Mr. Akers only, and it can therefore be readily understood why the Indians cannot understand why the presence of any other than Akers or heirs on the land is permitted. It therefore occurs, in connection with the suggestion that the land surrendered in 1889 be again acquired, that as these lands were, although not so stated in the written surrender, released by the Indians for the purpose of permitting the Government to transfer the same to Akers, and that as is now shown by the acceptance by the Dominion Lands Agent of an entry by another person covering a portion of the said lands, a portion of same was not occupied by the person for whose benefit they were surrendered, they must still remain vested in the Government for such disposal as may seem most conducive to the interests of the Indians. As in this case the disposal most conducive to the welfare of the Indians is to reacquire the ownership of the land. I would suggest that such portions as have not actually been occupied by and belong to Akers estate, be restored by the Government to the band, and that the Department of the Interior be asked to cancel the Arnold entry.
>
> Regarding the Department's suggestion that the Territory included in the Akers property might advisedly be secured by the Indians by purchase. I would point out, as strengthening the request for the restoration of the lands not occupied by that estate, that apparently no consideration was ever received by the Indians as an offset to the value of the 440 acres which they relinquished solely to permit of the settlement of a claim which was being pressed against the Government by the said D.A. Akers.[82]

Despite repeated exchanges of correspondence between the Departments of the Interior and Indian Affairs, no action was taken from 1894 to 1970 to address the issue of the Akers surrender.[83] In 1970, the Department of Indian Affairs acquired the following parcels of land and assigned them reserve status: northeast quarter section of section 3, the fractional part of northwest quarter section of section 2 between the St Mary's and Belly Rivers and the fractional part of southwest quarter of section 11 between the St Mary's and Belly Rivers. No further evidence dating from between 1970 and 1995, the date at which the specific claim was submitted, was presented to the inquiry.[84]

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[82] A.E. Forget, Assistant Indian Commissioner, to Hayter Reed, Deputy Superintendent General of Indian Affairs, July 19, 1894 (ICC Documents, pp. 367-68).

[83] See ICC Documents, pp. 371-465.

[84] Blood Tribe / Kainaiwa Specific Claim Submission: The Akers Surrender, April 1995 (ICC Exhibit 4).

TESTIMONY OF THE ELDERS

At the community meetings referred to earlier, the elders of the Blood Nation spoke in vivid terms about the traditional significance of the land that was the subject of the claim. They told the Commissioners of their respect for the land known to them as the "Place of Many People," which according to elder Pete Standingalone is known in Blackfoot as "akie-nes-qui."[85]

The land is part of a deep valley below the confluence of the Belly and St Mary's Rivers; it played a great role in the survival of the Blood Tribe, especially during the harsh winter months. As elder Rosie Day Rider told the Commissioners:

> It is a land that had plenty by way of those things that we need, wood, game, water. Our people used it to come together during the winter moons; they wintered in that area because it was plentiful in all that we needed.[86]

The necessity of that land to the survival of the Bloods was further explained by elder Rosie Red Crow:

> The land had many uses. It had all the things that we needed. It had the water, it had the wood that our people needed, it had the rocks that people used to weigh down the edges of the Teepees. The medicines that were found in that part of the land were numerous. It was a prime wintering place of our people because the temperatures were not as cold as in other places. There were many uses for that land. There is a tree that grows only there. During the winter time that horses will eat the bark of that tree. It grows no where else. The bark of that tree is like grain today to livestock. And it was important for the survival of our horses, particularly in harsh winters. And that tree only grows there.[87]

The land's importance was not only as a source of many of the practical necessities of life for the Bloods. Its significance was also historical and ceremonial in nature. This aspect was explained to the Commissioners by elder Louise Crop Eared Wolf, who advised that the land was not only an important source of the ceremonial red and yellow ochres used by the tribe, but also the best source

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85 ICC Transcript, December 2, 1997, vol. 2, p. 152 (Pete Standingalone).

86 ICC Transcript, October 22/23, 1997, vol. 1, p. 39 (Rosie Day Rider).

87 ICC Transcript, October 22/23, 1997, vol. 1, pp. 67-68 (Rosie Red Crow).

of the stone needed for making sacred pipes. Regarding the land's historical significance to the Bloods, elder Louise Crop Eared Wolf told the Commissioners that:

> The land in question is a very sacred land to our people. Many of our ancestors lay in that particular part of the land. That's one of the reasons they call it the land where there is many people. . . . Not too far from there was where a small camp of our people were when they were attacked by people from the east. And it has come to be known as the site of the last great battle between our people and the people from the east. . . . It is like one of your graveyards. It is sacred to our people.[88]

Given the importance of the land, it may be understood why the Blood elders believe that a surrender of the land (if such had occurred) would have been an event of great significance in the history of the tribe. Its oral history, as passed down through the generations and conveyed to the Commissioners at the community sessions, does not include a retelling of any such event. Therefore it is not surprising that the Blood people find it incredible that Chief Red Crow could have knowingly surrendered the land in 1889.

This conclusion became evident when the elders were questioned by Commission Counsel and by the Commissioners themselves at the community sessions.

In his presentation to the Commission regarding the oral history and traditions of the Blood people, Wilton Good Striker advised that it was only in the twentieth century that the language spoken by the Bloods came to include a word for "surrender."[89] Several of the elders, including Mary Louise Oka and Margaret Hind Man, commented upon the fact that Chief Red Crow did not understand or speak English, nor could he read or write. In the words of Margaret Hind Man:

> No, I did not hear about Red Crow or of Red Crow signing any document to sell or give away that piece land. He didn't know how to write nor did he know how to speak English, and I find it very strange that he would sign something that he didn't know what the contents were.[90]

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[88] ICC Transcript, December 2, 1997, vol. 2, pp. 197-99 (Louise Crop Eared Wolf).

[89] ICC Transcript, October 22/23, 1997, vol. 1, p. 29 (Wilton Good Striker).

[90] ICC Transcript, December 2, 1997, vol. 2, p. 186 (Margaret Hind Man).

If there was no word for "surrender" in the language spoken by Red Crow, and he did not speak or understand English, the Bloods find it difficult to see how he could have been made to understand the meaning of the surrender document. As a result, the Bloods believe that, if he were persuaded to mark a surrender document, apparently signifying his assent to it, the mark and the assent must have been obtained through misrepresentation or fraud. As stated by elder Louise Crop Eared Wolf:

> The Chieftains of the time knowingly would never sell or would never sign any document that proposed to sell or give away land. If in fact they did sign or place their mark, there must have been much by way of deceit. That was the time when none of our leaders neither understood nor could write nor read the English language. They had to rely on interpreters who in many cases were also unqualified to properly interpret what was being discussed. . . . Now, if in fact Red Crow and the other leaders were made to sign a document, I can only suspect that it was another act of deceit on somebody's part.[91]

Apart from Red Crow's inability to understand English, and the lack of a Blackfoot term to describe the surrendering of land, the elders relied upon their traditional knowledge of Red Crow's character to refute the theory that he would have assented to the surrender. Specifically, all of the Blood elders were united in their unshaken belief that it had been the desire of Red Crow to safeguard all the land inhabited by the Bloods for the benefit of future generations. Elder Mary Louise Oka told the Commission:

> In fact, Red Crow was well known for his guardianship and stewardship responsibilities with respect to the land. He instilled upon his fellow leaders, fellow clan leaders and his successors in his leadership responsibilities, that prime and foremost in their responsibilities was to safeguard the land and never to give up nor sell the land. When he gave up his responsibilities as leader to his son Crop Eared Wolf, that was one of the first things that he told Crop Eared Wolf, Never sell your land. Safeguard as hard as you can this land that belongs to our people. No, Red Crow did not sell the land.[92]

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91 ICC Transcript, December 2, 1997, vol. 2, pp. 204-05 (Louise Crop Eared Wolf).

92 ICC Transcript, December 2, 1997, vol. 2, p.167 (Mary Louise Oka).

Many of the Blood elders echoed her view, adding that it was not a tradition of the Bloods to have important decisions, especially decisions concerning land, made unilaterally by the Chief. When elder Pete Standingalone was asked by Commission Counsel if Red Crow could have decided on his own to surrender the land, he replied: "No. Even though he is the Head Man, he cannot make a decision by himself."[93]

Elder Louise Crop Eared Wolf elaborated:

> Sometimes it took a long time to make decisions because one of the most precious ways of our people is to respect the ideas and input of other people. And that's still a tradition that we use. The leaders had to share, bring together first of all their leaders within their clan, and then other clan leaders. And these meetings would always begin with the sharing of tobacco, particularly if it was a very important decision. In these kind of meetings, there was no argument. They made sure that there was input by everybody, and then they all agreed. It was by consensus that this is what we will do with respect to this particular issue. That was how they made decisions in those days. No individual by themselves could not make decisions, particularly important decisions.[94]

Because of the necessity of consultation, it was assured that knowledge of a major decision affecting the tribe as a whole would be widespread among the Blood people. The elders were confident that they would have heard of an event as significant as a land surrender. When elder Irene Day Rider was asked by Commission Counsel whether the holding of surrender meeting would have been an unusual event in 1889, and would have become part of the tribe's oral history, she stated:

> Yes, it would have been common knowledge to all of the people in our community. That is the way of our people. The leaders would have to have consulted the individual members of their clans, and everybody would have known about this particular surrender or giving away of land.[95]

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93 ICC Transcript, December 2, 1997, vol. 2, p. 151 (Pete Standingalone).

94 ICC Transcript, December 2, 1997, vol. 2, pp. 196-97 (Louise Crop Eared Wolf).

95 ICC Transcript, December 2, 1997, vol. 2, p. 217 (Irene Day Rider).

The elders also testified that the tribe had never received compensation from anyone for the land or for the use of the land. In their minds, however, compensation was not an issue, since they believed that the land had never been sold. According to the oral history of the Bloods, the occupant of the land, David Akers, was allowed to remain on the land because he lived with a Blood woman as his wife, and there was a child of the union. The elders testified that the traditions of their people required that a son-in-law help support his wife's family,[96] but that there was no intention that he be given or sold land in return.[97] As a result, Akers's occupation of the land did not signify anything more than a normal family arrangement. In their minds the land had always been a part of the reserve and would always remain so.

To the Bloods, stewardship of the land was not only an historical obligation but is also an ongoing responsibility of the tribe. Elder Mary Stella Bare Shin Bone, who is a granddaughter of the late Chief Shot Both Sides and a former councillor of the Bloods, stated:

> I refer to many times the stories that my grandfather told me with respect to his responsibilities and our responsibilities as a people with respect to the land. He would often tell me, You are coming to an age where you are becoming a very mature individual. You will be called upon to take part in major decisions of our people. Never sell your land. Always safeguard your rights and your stewardship, particularly your stewardship rights over the land. Look around you, he would often tell me, at all the land that has been taken away from us. What little land that you don't have left. Never allow them to take that away, nor never give it away.[98]

In summary, the Blood people do not believe that a surrender meeting concerning the Akers land ever took place, because their oral tradition includes no mention of it. In their view, their land has a sacred significance, and any momentous decision concerning it would have to be made by consultation and with the consent of all of the clan leaders, thereby guaranteeing the event a place in the tribe's oral history. They can only conclude that Red Crow's mark on the surrender document, if genuine, was obtained by fraud.

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96 ICC Transcript, October 22/23, 1997, vol. 1, p. 40 (Rosie Day Rider).

97 ICC Transcript, October 22/23, 1997, vol. 1, p. 82 (Rosie Red Crow).

98 ICC Transcript, December 2, 1997, vol. 2, p. 210 (Mary Stella Bare Shin Bone).

The feelings of the Bloods for the land in question may be best expressed by the evocative words of elder Louise Crop Eared Wolf near the conclusion of her testimony:

> We cannot sell the land. Every day we pray to the land, we give offerings to the land, we take the land as our mother. How can we sell something as precious as land? I find it unbelievable that this land was sold or given away, because we do not sell land.[99]

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[99] ICC Transcript, December 2, 1997, vol. 2, p. 202 (Louise Crop Eared Wolf).

PART III

ISSUES

The claim submitted by the Blood Tribe / Kainaiwa to the Minister raises issues of whether the 1889 Akers surrender was valid and, if valid, whether the Crown violated its fiduciary duty to the First Nation to act in its best interests in dealing with the lands and underlying mining and mineral rights. The revised planning conference summary attempted to consolidate the parties' positions on the issues before the inquiry:

> First, if the Commission found that the surrender is valid the First Nation might be entitled to a settlement compensating for the loss of use of the money that should have been paid to the First Nation at the time of the surrender in 1889. Second, a finding that the surrender is valid but that the Crown had a statutory or fiduciary obligation to withhold the mineral rights for the use and benefit of the First Nation could result in a claim for compensation for loss of mineral use and their market value. Third, a finding that the surrender was invalid could result in a claim for compensation for the current, unimproved value of the claim lands, including the value of mines and minerals, and loss of use of the land from 1889 to present. Therefore, it is important to examine whether the Crown breached its statutory and fiduciary obligations in relation to the 1889 surrender and the mines and minerals in order to determine what heads of compensation the First Nation is entitled to negotiate, if any.[100]

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[100] Summary (revised as of September 16, 1997), Indian Claims Commission Planning Conference, Blood Tribe / Kainaiwa First Nation [Akers Surrender (1889)], Calgary, Alberta, August 1, 1997, pp. 5-6.

PART IV

SUBMISSIONS

The 1996 Blood Tribe / Kainaiwa claim submission (reprinted as Appendix B) alleges that the 1889 Akers surrender was invalid, and that the Crown breached its obligations to the First Nation following the surrender. The following grounds were offered in support of these allegations:

(a) *surrender vote*: no valid surrender vote by the First Nation ever took place;

(b) *breach of Crown's fiduciary obligation*: following the purported surrender, the Crown failed "to deal with the mines and minerals in an appropriate way for the benefit of the Tribe."[101]

As a result, the First Nation asserts that compensation is owed to the First Nation of $753,379.18, excluding royalties stemming from any natural gas or petroleum also owing to the First Nation.[102]

SURRENDER VOTE

The 1996 Blood Tribe / Kainaiwa claim submission was, in fact, a supplemental submission to its original submission in 1995.[103] The 1995 submission included a lengthy historical study and legal argument, all of which is adopted in the 1996 Blood Tribe / Kainaiwa claim submission.[104] In particular, the First Nation submits that

> the Surrender is invalid. The Crown has certain legal obligations which must be met when the Crown proposes to initiate the formal surrender procedure. Furthermore,

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101 Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, August 19, 1996, p. 2.

102 Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, August 19, 1996, p. 11.

103 See Introduction to this report. Blood Tribe / Kainaiwa, Specific Claim Submission: The Akers Surrender, April 1995 (ICC Exhibit 4).

104 Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, August 19, 1996, p. 2.

> once the process is initiated, the Crown must follow the strict requirements of the *Indian Act* in taking the Surrender.[105]

The 1995 submission claims the surrender is invalid based on the following heads of relief: (1) fiduciary obligation, (2) breach of the Indian Act, (3) unconscionable bargain, (4) undue influence, (5) negligent misrepresentation, and (6) duress.[106]

The Supreme Court of Canada released its *Apsassin* decision, a major development in jurisprudence, after the Blood Tribe / Kainaiwa submitted its claim in 1995.[107] In *Apsassin*, Mr Justice Gonthier held for the Court that:

> I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention.[108]

The First Nation submits that "the Akers Surrender falls squarely within Justice Gonthier's description of when a Surrender will be found to be unlawful." The 1996 submission goes on to state:

> The Crown had offered the land to Akers believing it was not part of the Blood Reserve when, in fact, it was Blood Reserve land. As a result, the Crown had to quickly obtain a surrender of that land to rectify its own blunder and furthermore consciously attempted to do so, and did so, at no cost to the Crown. It certainly offends against the validity of a Surrender if the Crown pursues the Surrender with the express goal of convincing the Tribe that their right to land should be relinquished without any compensation in return. Yet this is exactly what occurred in this situation.[109]

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105 Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, Augus, 19, 1996, p. 2.

106 Blood Tribe / Kainaiwa, Specific Claim Submission: The Akers Surrender, April 1995 (ICC Exhibit 4).

107 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344.

108 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at 362.

109 Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, August 19, 1996, p. 3.

The First Nation cites two letters as evidence of this argument. The first was from Commissioner Hayter Reed on July 4, 1889, in which he requested additional instructions regarding compensation and the amount of land to be surrendered.[110] The second was from R. Sinclair, acting Deputy Superintendent General, on July 13, 1889, in which he responded, stating:

> when taking the surrender you had better make the most favourable terms possible with the Indians, committing the Department as little as possible to any question of compensation, either in land or in any other way . . . The Superintendent General doubts whether an equivalent in land could be given to the Indians in the immediate locality of the Reserve, and he considers that land at any distance from their Reserve would be comparatively valueless to them.[111]

The First Nation further argues that the Crown clearly subordinated the First Nation's interests to its own, citing the evidence discussed above. In summary, the 1996 submission states that "the Crown's actions and motives in taking the Surrender and the subsequent affidavit as well as the lack of a surrender vote tainted the dealings as discussed by Gonthier J. in *Apsassin*."[112]

FIDUCIARY OBLIGATION BREACHED

The First Nation also presents an alternative argument in both the 1995 and 1996 submissions. The First Nation submits that, even if the surrender was valid, the Crown violated its fiduciary obligation to the Blood Tribe / Kainaiwa to deal with the lands and the mines and minerals in the best interests of the First Nation. In particular, the Crown ought to have sold the coal in 1889 while retaining all remaining mines and minerals for the benefit of the Blood Tribe. In support of this position, the 1996 submission cites *Apsassin* for the proposition that the Crown had a fiduciary duty not to inadvertently

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110 Hayter Reed, Indian Commissioner, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, July 4, 1889 (ICC Documents, pp. 267-68).

111 R. Sinclair, Acting Deputy Superintendent General of Indian Affairs, to Hayter Reed, Indian Commissioner, July 13, 1889 (ICC Documents, p. 269).

112 Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, August 19, 1996, p. 3.

give away a potentially valuable asset of the First Nation.[113] By failing to do so, the First Nation submits that the Crown breached its fiduciary obligation.[114]

Regarding the First Nation's submissions on *Apsassin*, no finding will be made by the Commission on this matter as the inquiry was concluded before completion. The Commission's position on *Apsassin* has been considered previously in its 1998 report on the Kahkewistahaw First Nation Treaty Land Entitlement Inquiry.[115]

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113 Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, August 19, 1996, pp. 6-7.

114 Blood Tribe / Kainaiwa, Blood Tribe Supplemental Submission relating to the Akers Surrender, August 19, 1996, p. 11.

115 ICC, *Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation* (Ottawa, November 1996), reported (1998) 6 ICCP 21.

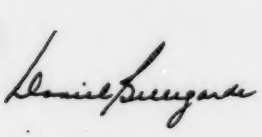
PART V

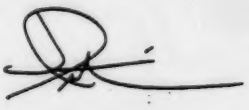
CONCLUSION

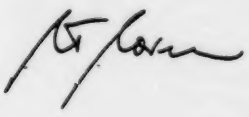
In December 1997, DIAND informed the parties that it had asked the Department of Justice to undertake a further review of the Kainaiwa Akers surrender of 1889. Accordingly, the Commission inquiry was held in abeyance until the Department of Justice rendered its opinion. As noted above, on April 15, 1998, Canada advised that the Blood Tribe / Kainaiwa's specific claim regarding the 1889 Akers surrender had been accepted for negotiation of a settlement. In particular, DIAND accepted that an outstanding lawful obligation existed with respect to the Akers surrender. This conclusion was "based on the premise that the full and informed consent of the adult, male members of the Tribe was not properly obtained, thereby rendering the September 2, 1889 surrender of 440 acres of legally invalid."

In light of Canada's offer to accept the Blood Tribe / Kainaiwa claim for negotiation under the Specific Claims Policy, further inquiry into this matter is no longer necessary. The Commission commends the parties for their cooperation regarding matters of substance and form throughout the proceedings. We affirm and encourage this spirit of justice and fairness during the negotiations for settlement, being ever mindful of both the passage of time since the events precipitating this inquiry, and those elders of Blood Tribe / Kainaiwa who await a just resolution to this matter.

FOR THE INDIAN CLAIMS COMMISSION







Daniel J. Bellegarde
Commission Co-Chair

P.E. James Prentice, QC
Commission Co-Chair

Carole T. Corcoran
Commissioner

Dated this 30th day of June, 1999.

APPENDIX A

GOVERNMENT OF CANADA'S OFFER TO ACCEPT CLAIM

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Assistant Deputy Minister
Sous-ministre adjoint

Ottawa, Canada
K1A 0H4

95081408 APR 17 '98

April 15, 1998

WITHOUT PREJUDICE

Chief Chris Shade
Blood Tribe/Kainaiwa
P.O. Box 60
STANDOFF AB T0L 1V0

Dear Chief Shade:

On behalf of the Government of Canada and in accordance with the Specific Claims Policy, I offer, as set out below, to accept for negotiations the Blood Tribe/Kainaiwa's (the Tribe) Specific Claim regarding the September 2, 1889 Akers Surrender of 440 acres.

For the purposes of negotiations, Canada accepts that the Band has sufficiently established that Canada has an outstanding lawful obligation within the meaning of the Specific Claims Policy, with respect to the First Nation's allegation that the surrender of 440 acres was invalid. As a result of a recent review of our position on this surrender, the Department of Indian Affairs and Northern Development accepts that there exists a lawful obligation based on the premise that the full and informed consent of the adult, male members of the Tribe was not properly obtained, thereby rendering the September 2, 1889 surrender of 440 acres legally invalid.

The steps of the specific claims process, which will be followed hereafter, include agreement on a joint negotiating protocol, development of a settlement agreement, conclusion of the agreement, ratification of the agreement, and finally, implementation of the agreement. Throughout the process, all government files, including all documents submitted to the Government of Canada concerning the claim, are subject to the Access to Information and Privacy Legislation.

.../2

All negotiations are conducted on a "without prejudice" basis. The acceptance of this claim for negotiation of a settlement is not to be interpreted as an admission of fact or liability by the Government of Canada. In the event that no settlement is reached and litigation ensues, the Government of Canada reserves the right to plead all defences available to it, including limitation periods, laches, and lack of admissible evidence.

The settlement of this claim will be in accordance with Canada's Specific Claims Policy, as explained in the booklet Outstanding Business. As for the elements of the claim accepted for negotiations, compensation will be based on Compensation Criteria 3 and 9. The value of the compensation will take into account all the relevant criteria. No individual criterion will be viewed in isolation. Compensation will be a global amount based on all applicable criteria.

It should be noted that 219 of the 440 acres were returned to the Tribe in 1970. More recently, negotiations on the matter of compensation were completed in 1996. As a result, these factors will be taken into account during any future negotiations on the 1889 Surrender. The settlement agreement between Canada and the Tribe dated November 7, 1996 provided for future negotiations on the matter of the validity of the surrender.

In the event that a final settlement is reached, Canada will require from the Tribe a final and formal release on every aspect of this claim, in order to ensure that the claim cannot be reopened. Canada would further stipulate that in order to obtain certainty with respect to the surrendered lands, an absolute present day surrender will be required as part of any prospective settlement of this claim. As part of the settlement, the Government of Canada will also require an indemnity from the Tribe.

I would like to thank the Tribal Elders and the members of the Tribe for their contributions to the Indian Claims Commission inquiry process. I look forward to a successful resolution of this matter.

.../3

- 3 -

Mr. Ian D. Gray of the Specific Claims Branch - Negotiations Operations Directorate has been designated as your primary contact on this claim. Mr. Gray can be reached at (819) 953-0031. I send you my best wishes and I am confident that a fair settlement can be reached.

Yours truly,

John Sinclair
Assistant Deputy Minister
Claims and Indian Government

c.c.: Indian Claims Commission
Lesia Ostertag, Pillipow & Company
Michel Roy
Cynthia Shipton-Mitchell

APPENDIX B

1996 BLOOD TRIBE / KAINAIWA CLAIM SUPPLEMENTAL SUBMISSION

BLOOD TRIBE/ KAINAIWA

SUPPLEMENTAL SUBMISSION

THE AKERS SURRENDER

Submitted on behalf of the Tribe by:

Pillipow & Company
Barristers and Solicitors
102 - 500 Spadina Crescent East
Saskatoon, Saskatchewan
S7K 4H9

PHONE: (306) 665-3456
FAX: (306) 665-3411

Lawyers in Charge: William J. Pillipow
and Lesia S. Ostertag

August 19, 1996

SUPPLEMENTAL SUBMISSION

I. Background to Claim

In 1884 David Evan Akers requested 330 acres of land as homestead lands (which included some 225 acres of Blood Reserve land) from the federal government. The request sparked great confusion within the Department of Indian Affairs and the Department of the Interior as to whether the land requested by Akers was within the Blood Reserve or not. The Department of Indian Affairs in 1885 erroneously advised the Department of the Interior that the land was not included in the "Blood or any other reserve" and the lands were then promised to David Akers. In 1889, after the error was discovered, Indian Commissioner Reed was instructed to take a surrender from the Indians of the relevant lands in order to rectify the blunder and was specifically instructed "that when taking the surrender you had better make the most favourable terms possible with the Indians, committing the Department as little as possible to any question of compensation, either in land or any other way." A purported Surrender was taken on September 2, 1889 for 440 acres of land, 215 acres in excess of what Akers had been previously promised.

The affidavit to the Surrender was not marked until December 20, 1889. Before marking the document Head Chief Red Crow was informed that he could not refuse to make the affidavit since he had already marked two previous ones to correct errors, and that this affidavit was to correct another error. The Tribe is of the view that this affidavit was taken under highly suspicious circumstances.

On August 5, 1892 a patent was issued in the name of David E. Akers for 225 acres of the relevant lands and mines and minerals. By October, 1893, Akers' creditors had seized the subject land, yet the Department of Indian Affairs made no attempt to re-acquire the lands for the Tribe. Later that month there were discussions between the Department of Indian Affairs and the Department of the Interior for return of the Surrendered lands which were not patented to Akers, but no action was taken. It was not until April of 1930 that the 219 acres (more or less) of Surrendered land which was not patented to Akers was transferred from the Department of the Interior to the Department of Indian Affairs. No action was taken to return that 219 acres (more or less) to reserve status for the benefit of the Tribe until August of 1970. At no time did

the Tribe receive compensation for the land or mines and minerals which were purportedly Surrendered on September 2, 1889.

At this time, the Tribe believes that there still are two issues outstanding. Firstly, the Tribe continues to question the validity of the Akers Surrender. Secondly, even if the Surrender was valid (which is denied) the Tribe believes that the Crown breached its fiduciary obligation owed to the Tribe following the purported surrender to deal with the mines and minerals in an appropriate way for the benefit of the Tribe.

II. Validity of the Surrender

The Tribe is strongly of the view that the Surrender is invalid and believe that a Court would agree with this position. The Crown has certain legal obligations which must be met when the Crown proposes to initiate the formal surrender procedure. Furthermore, once the process is initiated, the Crown must follow the strict requirements of the *Indian Act* in taking the Surrender. The legal arguments supporting this position were previously discussed in the original written Submission in support of this Claim. As well, the absence of a proper Surrender meeting and vote were thoroughly discussed in the original Submission and will not be reiterated in this Supplemental Submission.

In light of the Supreme Court of Canada decision of *Blueberry River Indian Band v. Canada*, [1996] 2 C.N.L.R. 25 (hereinafter "*Apsassin*"), specific elements of our original argument regarding the validity of the Surrender need to be emphasized. The *Apsassin* case involves a Treaty 8 First Nation with reserve lands in Northern British Columbia. In 1940 the First Nation surrendered the mineral rights on its reserve to the Crown for leasing. In 1945 (at the end of World War II), the First Nation consented to surrender the whole reserve to the Crown for "sale or lease". The land and minerals were then transferred to the Director of the *Veterans' Land Act* for soldier settlement purposes.

The Supreme Court of Canada agreed with the Federal Court of Appeal that no fiduciary duty was breached by the Crown on the facts of the case. As a result, the 1945 surrender was found to be valid. However, Gonthier, J. writing for the majority, noted at paragraph 14 as follows:

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> I should also add that **I would be reluctant to give effect to this surrender** variation [the 1945 Surrender] **if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention.**

The Akers Surrender falls squarely within Justice Gonthier's description of when a Surrender will be found to be unlawful. The Crown had offered the land to Akers believing it was not part of the Blood Reserve when, in fact, it was Blood Reserve land. As a result, the Crown had to quickly obtain a surrender of that land to rectify its own blunder and furthermore consciously attempted to do so, and did so, at no cost to the Crown. It certainly offends against the validity of a Surrender if the Crown pursues the Surrender with the express goal of convincing the Tribe that their right to land should be relinquished without any compensation in return. Yet this is exactly what occurred in this situation.

Evidence to this effect is found in two letters. In a request for further instructions in connection with the proposed Surrender, Indian Commissioner Reed writes:

> I have the honor to acknowledge the receipt of your letter of the 25th ultimo, authorizing me to ask the Blood Indians to surrender the land within their reserve, laid claim to by Mr. David E. Akers.
>
> ...
>
> **I will be glad moreover to be informed whether, in the event of the Indians which however I do not think probable requesting an equivalent in land, for the portion to be surrendered, I am at liberty to promise it, and if so, where it will be available, or again whether, if they ask for compensation of some other kind, I may grant it.**
>
> (Doc. No. 98)
> (emphasis added).

In reply, R. Sinclair, the Acting Deputy Superintendent General of Indian Affairs, writes on July 13, 1889 as follows:

> In beg to acknowledge the receipt of your letter of the 4th instant, No. 24,661, relative to the proposed surrender by the Blood Indians of land on their Reserve, claimed by David E. Akers.
>
> **In reply I have to inform you that when taking the surrender you had better make the most favourable terms possible with the Indians, committing the Department as little as possible to any question of compensation, either in land or in any other way.**

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> The Superintendent General doubts whether an equivalent in land could be given to the Indians in the immediate locality of their Reserve, and he considers that land at any distance from their Reserve would be comparatively valueless to them. He will be glad, however, to learn what are the wishes of the Indians in this respect. It is hoped that your opinion that the Indians will not make any demand for an equivalent in land may prove to be correct.
>
> (Doc. No. 99)
> (emphasis added)

Clearly, the Crown never intended to discuss with the members that compensation should have been payable for the land either in cash or equivalent land. At the same time, the Crown was insisting that Akers would have to pay the Crown for the land (Docs. No. 6, 40). A position such as this is appalling and clearly falls within Gonthier's meaning of the term "tainted" dealings.

Furthermore, it is evident that the Crown was in fact turning to the Tribe to remedy their blunder in erroneously offering land to Akers that truly belonged to the Tribe. The Crown in taking the purported Surrender was clearly putting its interests ahead of those of the Tribe. This is highlighted by Deputy Superintendent General Vankoughnet's letter dated June 25, 1889 to Indian Commissioner Reed where he states:

> With reference to the subject matter of the correspondence contained in these papers, viz. Mr. David E. Akers' claim to land at the confluence of the St. Mary and Belly Rivers which forms part of the Blood Reserve, I have to refer you to my letter of the 24th Feb. 1887, and **I have to state that in view of all the circumstances the only course now to pursue would appear to be to ask the Indians to surrender the land in question with a view to Mr. Akers' title thereto being perfected, which, if you agree, you are hereby authorized to do and I enclose a printed form of surrender and affidavit to be used in connection therewith.** The proceeds in taking the Surrender should be conducted strictly in conformity with the provisions of the Indian Act.
>
> (Doc. No. 97)
> (emphasis added)

At no time did the Crown consider the interests of the Tribe. The Crown was more interested in finding a solution to an embarrassing problem which had nothing to do with the Tribe.

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In addition, circumstances surrounding the swearing of the affidavit required by the *Indian Act* reveal calculated deception and fraud on the part of the Crown. The Surrender was purportedly taken on September 2, 1889; the affidavit was not signed until December 20, 1889. On January 8, 1890, the Indian Agent, W. Pocklington, reported to the Indian Commissioner in Regina as follows:

> I am pleased to report that I have at length succeeded in inducing "Red Crow" to make the affidavit before His Honour Judge Macleod releasing that portion of the Reserve claimed by W. D. Akers at Whoop-up on the 19th ult. I took "Red Crow" to Macleod and en route spoke to him on the question at last he told me that Mr. Akers had told "Day Chief" that he wanted the Indians to run him off the Reserve, no doubt with a view to making a claim against the Government for the same. **I told "Red Crow" he could not very well refuse to make the affidavit as he had already done so twice but unfortunately owing to an error in the survey, we wished him to make another.** He at least said that if Mr. Justice Macleod and I said it was right he would make the affidavit. I think I wrote to you from Macleod reporting this. I left the papers with His Honour who doubtless [eve?] this has forwarded it to you.
>
> (Doc. No. 107)
> (emphasis added)

Head Chief Red Crow was deceived into believing he was merely correcting a problem with the land exchange as opposed to giving up further land which was properly within the Reserve.

It is clear that the Crown's actions and motives in taking the Surrender and the subsequent affidavit as well as the lack of a surrender vote "tainted" the dealings as discussed by Gonthier J. in *Apsassin*. It is highly unlikely that the Tribe would have knowingly given up scarce Reserve land for no compensation. It is completely evident from the documentation that the Crown was turning to the Tribe to remedy a troubling and embarrassing problem of their own making. As a result, it would be unsafe to rely on the Tribe's understanding and intention with respect to the Surrender.

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III. Mines and Minerals

Even if the Surrender is valid, (which is denied), it is the Tribe's position that the Crown should have dealt with the mines and minerals differently from how they did. Following the 1889 Surrender, the Crown became the fiduciary of the land and the mines and minerals and was to deal with both in the best interest of the Tribe. Given the historical evidence, that duty should have resulted in the Crown selling the coal in 1889 but retaining all remaining mines and minerals for the benefit of the Tribe over time.

The legal foundation for this position flows from the recent Supreme Court of Canada ruling in the *Apsassin* case. In that case, the land and minerals were transferred to the Director of the *Veterans' Land Act* for soldier settlement purposes following the purported surrender. The evidence in the case established that the minerals were transferred to the Director (and subsequently the veterans) for no added consideration. Natural gas of significant value was later discovered on these lands.

The majority decision found that the 1945 Surrender included both the surface and mines and minerals. They found that the 1945 Surrender subsumed the earlier 1940 Surrender of mines and minerals for leasing purposes and expanded upon it. Specifically, however, they found that with respect to the mineral rights that there was no clear authorization from the First Nation which justified the Department departing from its long-standing policy of reserving mineral rights when surface rights were sold.

Mr. Justice Gonthier states at pages 11-12 of his reasons as follows:

> In my view, it is critical to the outcome of this case that the 1945 agreement was a surrender in trust, to sell or lease. The terms of the trust agreement provided the DIA with the discretion to sell or lease, and since the DIA was under a fiduciary duty *vis-a-vis* the Band, it was required to exercise this discretion in the Band's best interests. Of equal importance is the fact that the 1945 surrender gave the DIA a virtual *carte blanche* to determine the terms upon which I.R. 172 would be sold or leased. The only limitation was that these terms had to be "conducive" to the "welfare" of the Band. Because of the scope of the discretion granted to the DIA, it would have been open to the DIA to sell the surface rights in I.R. 172 to the Director, *Veterans' Land Act* (DVLA), while continuing to

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> lease the mineral rights for the benefit of the Band, as per the 1940 surrender agreement.
>
> Why this option was not chosen is a mystery. As my colleague McLachlin J. observes, the DIA had a long-standing policy, pre-dating the 1945 surrender, to reserve out mineral rights for the benefit of the aboriginal peoples when surrendered Indian lands were sold off. This policy was adopted precisely because reserving mineral rights were thought to be "conducive to the welfare" of aboriginal peoples in all cases. The existence and rationale of this policy (the wisdom of which, though obvious, is evidenced by the facts of this case) justifies the conclusion that the DIA was under a fiduciary duty to reserve, for the benefit of the Beaver Band, the mineral rights in I.R. 172 when it sold the surface rights to the DVLA in March 1948. In other words, the DIA should have continued to lease the mineral rights for the benefit of the Band as it had been doing since 1940. Its failure to do so can only be explained as "inadvertence".

The minority decision which did not differ in the end result just the route to get there, found that the 1945 Surrender did not include the mines and minerals because they were already subject to the 1940 Surrender for lease. They found that the 1940 Surrender for lease imposed a fiduciary duty on the Crown with respect to the mineral rights for leasing and that the Department breached this duty by conveying the rights to the Director of the *Veterans' Lands Act* in 1948.

The headnote of the case summarizes McLachlin's decision as follows:

> ... even if one were to assume that the 1945 surrender revoked the previous surrender of mineral rights, the 1945 surrender still imposed an obligation on the Crown to lease or sell in the best interests of the Band. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. **The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band. The duty on the Crown as fiduciary was that of a man of ordinary prudence in managing his own affairs.**

The unanimous result of all nine judges was that the minerals should have been retained and leased for the benefit of the First Nation.

This decision is clearly applicable to the Akers Claim. In *Apsassin,* the Supreme Court emphasizes the Crown's own policy of reserving mines and minerals as being

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important to their ultimate decision. Canada's own policy with respect to Crown land prior to the 1889 Surrender was to reserve the mines and minerals when issuing patents for land. The research done by Hugh Dempsey (copy attached) indicates that in 1887 an Order in Council was passed reserving all minerals for the Crown. Dempsey states, in part, "All patents from the Crown shall reserve to Her Majesty, Her Successors and Assigns forever, all mines and minerals which may be found to exist within, upon, or under such lands, together with full power to work the same". Mr. Dempsey continues in his report as follows (at p. 2):

> According to historian David Breen, "Henceforth, no lands were alienated without a clause in the patent specifically reserving mines and minerals to the Crown. This was a change of far-reaching consequence. At a stroke, Canada set upon a course of resource exploitation that differed significantly from that in the United States where typically land titles combined surface and subsurface rights. Nowhere is the longer-term consequence of this difference more apparent than in the development of the petroleum industry in western Canada."

This being Canada's policy at the time, the Crown should not have departed from it when acting as a fiduciary for the benefit of the Tribe.

Furthermore, if the Crown was going to offer the mines and minerals with the surface rights at a bare minimum, appropriate compensation should have been received. The minority judgment forcefully argues that the test is what a "man of ordinary prudence in managing his own affairs" would have done. Far from being a "remote possibility", Hugh Dempsey's report supports the fact that the value of petroleum and natural gas was known at the time and the existence of petroleum and natural gas in the area was well known by the 1889 Surrender. Dempsey reports on page 3 as follows:

> The Senate of Canada made an examination in 1887-88 of the "Great Mackenzie Basin," focusing on mineral and agricultural resources. This study was in part inspired by publicity relating to oil discoveries in the West and the belief that the Athabasca tar sands "were thought to be the surface manifestation of an underground pool of oil." In its final report in 1888, the Senate stated that "The evidence submitted to your Committee points to the existence in the Athabasca and Mackenzie Valleys of the most extensive petroleum field in America, if not in the World... it is probable this great petroleum field will assume an enormous value in the near future and will rank among the chief assets comprised in the Crown domain of the Dominion."

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> In 1889, Robert McConnell, of the Geological Survey, made a further examination of the tar sands and indicated there were 6.5 cubic miles of bitumen in the region. He also recommended that drilling commence in the area to locate the pools of oil believed to be under the sands.
>
> Meanwhile, the Athabasca tar sands were receiving attention both from Canadian newspapers and oil specialists throughout the world...

Dempsey reports widespread publicity and interest in the discovery of oil in Alberta. Federal interest was even heightened to a point where they began separating surface and subsurface rights, reserving minerals and mines to the Crown. This clearly indicates that the Federal government recognized an economic value in mineral rights which made it worthwhile to reserve these rights for itself. Even the list of people filing oil claims in 1889 indicates the knowledge that the Federal government had with respect to the value of minerals in the area. Those filing oil claims in 1889 include:

- ⇒ John Herron, a staunch Conservative and elected Member of Parliament in 1904
- ⇒ A.R. Springett, a former Indian Agent on the Peigan Reserve
- ⇒ A.P. Patrick, Dominion Land Surveyor
- ⇒ A.A. McCullough and Alex McLennan, successful Pincher Creek ranchers

Furthermore, a number of newspapers carrying stories about the oil discoveries were owned by Members of Parliament and include:

- ⇒ *Regina Leader*, owned by Nicholas Flood Davin, Conservative Member of Parliament, 1887-1900
- ⇒ *Edmonton Bulletin*, owned by Frank Oliver, Member of the Legislative Assembly of the North-West Territory, 1888-96, and Liberal Minister of the Interior, 1905-11
- ⇒ *Calgary Herald*, partly owned by D.W. Davis, Conservative Member of Parliament for Fort Macleod
- ⇒ *Macleod Gazette*, strongly supported the Conservative party

The number of government employees aware of the oil discoveries in Alberta make it inconceivable that the Crown did not know of the discoveries or of the value of such discoveries. It is a virtual certainty that between the wide publicity and the

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personal knowledge of individuals, the Crown was well aware of the value and importance in mines and minerals.

The appraisal report prepared by Serecon Valuation and Agricultural Consulting Inc. for Public Works and Government Services Canada, entitled "Blood/Kainaiwa Tribe Specific Claim Appraisal of Surrendered Lands Within Township 8, Range 22, W4th" suggests that there would have been very limited oil and gas and coal production from this land, resulting in minimal or no economic return. However, the appraiser correctly notes that no geological studies support this opinion (at p. 39). Obviously, an opinion as to the existence or non-existence of certain mines or minerals is a highly technical matter and one that Mr. Simpson is not qualified to give.

Even if we accept Serecon's report, which we do not, the report fails to take into account the lost opportunity of leasing the land for exploration had the Crown retained ownership of the petroleum and natural gas rights for the benefit of the Tribe. McDaniel & Associates prepared a detailed report dated April 10, 1996, analyzing the revenue which the Blood Tribe would likely have received just from leasing the petroleum and natural gas rights to the lands between 1889 to January 1, 1996, had the Crown retained ownership of the petroleum and natural gas rights for the benefit of the Tribe.

The McDaniel & Associates report clearly illustrates that land adjacent to and contiguous with the land in question had been leased at different times since the purported surrender, and therefore it is highly reasonable that the land in question would have been leased at the same time for the purpose of exploration if the minerals had been retained for the benefit of the Tribe. McDaniel & Associates used only the lease payments of directly adjacent lands in arriving at their estimate of payments lost to the Tribe. It must be pointed out that land in the general area was leased at a much higher fee, yet the report used only lease payments of **directly adjacent lands**, resulting in a more conservative estimate.

On the basis of this analysis, McDaniel & Associates illustrate no fewer than nine leases directly adjacent to the land in question. The dates and value of these leases are listed below:

Date	Original Amount ($)	Value at 01-Jan-96 ($)
01-Mar-38	44.40	2,671.68
01-Sep-49	222.00	7,565.55
07-Jul-55	2,752.80	70,276.11
29-May-58	222.00	4,770.18
14-Sep-67	270.84	3,695.72
30-Aug-79	124,710.72	685,805.74
01-May-80	-8,085.00	- 39,829.21
27-Mar-90	2,960.59	4,872.33
24-Jan-94	12,423.12	14,551.09

This very conservative approach demonstrates compensation owing to the Tribe of $753,379.18. This, of course, does not include royalties stemming from any natural gas or petroleum which would have been exploited pursuant to these exploration leases.

As well, AFC Agra Services Ltd. values the gravel on these lands alone at $125,000.00. The Tribe is also currently studying the value of other mines and minerals on the subject land.

IV. Conclusion

The position of the Tribe is that following the 1889 Surrender, the Crown became the fiduciary of the mines and minerals (and the surface) and was to deal with those mines and minerals in the best interest of the Tribe. That duty, in our view, should have resulted in the Crown selling the coal in 1889 but retaining all remaining mines and minerals and leasing or developing the remaining mines and minerals for the benefit of the Tribe over time. This not being done, the Crown breached its fiduciary obligations to the Tribe.

All of which is submitted this 19th day of August, 1996 on behalf of the Blood Tribe.

PILLIPOW & COMPANY

Per: _____

APPENDIX C

BLOOD TRIBE / KAINAIWA 1889 AKERS SURRENDER INQUIRY

1	Planning conference	August 1, 1997
2	Community sessions	October 22 and 23, 1997 December 2, 1997

Two community sessions were held at Blood Reserve, Alberta. At the first, the Commission heard from the following witnesses: Wilton Good Striker, Rosie Day Rider, Rosie Red Crow, Adam Delaney, Ted Brave Rock.

Witnesses heard at the second session were: Pete Standingalone, Mary Louise Oka, Margaret Hind Man, Louise Crop Eared Wolf, Mary Stella Bare Shin Bone, Irene Day Rider.

3	Canada's offer to negotiate	April 15, 1998